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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 SEAN MONTGOMERY,

12 Petitioner,

13 v.

14 BILL GORE, Warden

15 Respondent.

Civil No. 13-2045 BTM (MDD)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

16 Petitioner, a detainee at San Diego County Jail, proceeding pro se, has filed a  
17 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.<sup>1</sup>

18 **FAILURE TO SATISFY THE FILING FEE REQUIREMENT**

19 but has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma  
20 pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00  
21 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case  
22 without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed  
23 with this case, he must submit, **no later than November 4, 2013**, a copy of this Order  
24 with the \$5.00 fee or with adequate proof of his inability to pay the fee. The Clerk of  
25 Court shall send a blank Southern District of California In Forma Pauperis Application  
26 to Petitioner along with a copy of this Order.

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28 <sup>1</sup> The Petition was originally filed in the United States Court of Appeals for the Ninth Circuit. The Court of Appeals transferred the Petition to this Court on August 29, 2013. (*See* ECF No. 3.)

## 1      **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

2      Further, habeas petitioners who wish to challenge either their state court conviction  
 3 or the length of their confinement in state prison, must first exhaust state judicial  
 4 remedies. 28 U.S.C. § 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987).  
 5 To exhaust state judicial remedies, a California state prisoner must present the California  
 6 Supreme Court with a fair opportunity to rule on the merits of every issue raised in his  
 7 or her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34.  
 8 Moreover, to properly exhaust state court remedies a petitioner must allege, in state court,  
 9 how one or more of his or her federal rights have been violated. The Supreme Court in  
 10 *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the  
 11 opportunity to correct alleged violations of prisoners’ federal rights, they must surely be  
 12 alerted to the fact that the prisoners are asserting claims under the United States  
 13 Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas petitioner  
 14 wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due  
 15 process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not  
 16 only in federal court, but in state court.” *Id.* at 366 (emphasis added).

17      Nowhere on the Petition does Petitioner allege that he raised his claims in the  
 18 California Supreme Court. Petitioner is currently detained at San Diego County Jail. In  
 19 his Petition he references numerous case numbers. He claims his defense counsel is  
 20 ineffective and that his right to a speedy trial has been denied. (*See* Pet. at 5-9.) It is not  
 21 clear that Petitioner has yet suffered convictions for any of the cases referenced,<sup>2</sup> or if he  
 22 is still awaiting trial on all charges.<sup>3</sup> It is clear, however, that Petitioner has not alleged

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24      <sup>2</sup> While not entirely clear, there is some indication that Petitioner has been convicted of some  
 25 charges, but not yet sentenced at the time the petition was filed. (*See* Pet. at 4.)

26      <sup>3</sup> Federal courts generally abstain from interfering with pending state criminal proceedings  
 27 before the entry of a judgment of conviction. Fundamental principles of “comity and federalism”  
 28 prohibit federal courts from intervening in ongoing state actions. *Younger v. Harris*, 401 U.S. 37, 45  
 (1971). Under *Younger*, federal courts may not interfere with ongoing state criminal proceedings absent  
 extraordinary circumstances. *Id.* at 45-46; *see Middlesex County Ethics Comm. v. Garden State Bar*  
*Ass’n*, 457 U.S. 423, 431 (1982) (stating that *Younger* “espouse[d] a strong federal policy against  
 federal-court interference with pending state judicial proceedings.”) These concerns are particularly

1 to have raised his claims in the California Supreme Court. Petitioner has raised his  
 2 claims in the California Supreme Court he must so specify. “The burden of proving that  
 3 a claim has been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907,  
 4 911 (4th Cir. 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert*  
 5 *v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300  
 6 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

7 Further, the Court cautions Petitioner that under the Antiterrorism and Effective  
 8 Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a  
 9 petition for a writ of habeas corpus by a person in custody pursuant to the judgment of  
 10 a State court. The limitation period shall run from the latest of:

11 (A) the date on which the judgment became final by the  
 12 conclusion of direct review or the expiration of the time for  
 seeking such review;

13 (B) the date on which the impediment to filing an  
 14 application created by State action in violation of the  
 Constitution or laws of the United States is removed, if the  
 applicant was prevented from filing by such State action;

15 (C) the date on which the constitutional right asserted  
 16 was initially recognized by the Supreme Court, if the right has  
 17 been newly recognized by the Supreme Court and made  
 retroactively applicable to cases on collateral review; or

18 (D) the date on which the factual predicate of the claim  
 19 or claims presented could have been discovered through the  
 exercise of due diligence.

20 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

21 The statute of limitations does not run while a properly filed state habeas corpus  
 22 petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006  
 23 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an  
 24 application is ‘properly filed’ when its delivery and acceptance [by the appropriate court  
 25 officer for placement into the record] are in compliance with the applicable laws and rules  
 26 governing filings.”). However, absent some other basis for tolling, the statute of

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 28 important in the habeas context where a state prisoner’s conviction may be reversed on appeal, thereby  
 rendering the federal issue moot. *Sherwood v. Tompkins*, 716 F.2d 632, 634 (9th Cir. 1983).

1 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533  
2 U.S. 167, 181-82 (2001).

3 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal  
4 of a habeas petition “[i]f it plainly appears from the face of the petition and any exhibits  
5 annexed to it that the petitioner is not entitled to relief in the district court . . .” Rule 4,  
6 28 U.S.C. foll. § 2254. Here, it appears plain from the Petition that Petitioner is not  
7 presently entitled to federal habeas relief because he has not alleged exhaustion of state  
8 court remedies.

### 9 CONCLUSION

10 For the foregoing reasons, the Petition is **DISMISSED** without prejudice for  
11 failure to satisfy the filing fee and failure to allege exhaustion of state judicial remedies.  
12 If Petitioner wishes to have this case reopened, he must, **no later than November 4,**  
13 **2013**, (1) pay the filing fee or provide adequate proof of his inability to pay **and** (2) file  
14 a First Amended Petition which cures the pleading deficiencies discussed above.

15 **IT IS SO ORDERED.**

16 DATED: September 25, 2013

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18 BARRY TED MOSKOWITZ, Chief Judge  
19 United States District Court  
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